

AF 57W

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Re: Application No. 09/866,652;
Art Unit: 3624; Examiner: Charles R. Kyle

January 14th 2005

Dear Sir/Madam,

Enclosed please find the below described materials relating to the above identified application for U.S. Utility Patent in the name of Tommaso Innocenti of Prato, Italy:

- | | | |
|----|-------------------------------------------------------------------------------------------------------|---------------------------------------|
| a. | Letter of Transmittal & Certificate of Mailing on: | 1 sheet; (this one) |
| b. | 'Compliance with 37 CFR §1.192(c)' on: | 2 sheets; |
| c. | 'Amended Brief in Support of Appeal - 37 CFR §1.192'
& Appendix (Claims 40 - 76) in triplicate on: | <u>96 sheets;</u>
99 sheets total. |

Please file the above described materials in the above identified application for patent.
Thank you kindly for your service.

Respectfully yours,

Peter Gibson, Reg. #34,605

Peter Gibson, Reg. #34,605

Tel. 410/358-5912; Fax -9636

Certificate of Mailing

I, Peter Gibson, Reg. #34,605, hereby certify with my dated signature below that the above described materials are being deposited with the U.S. Postal Service in an envelope bearing sufficient postage as First Class Mail addressed to 'Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450' today, January 14th 2005.

Peter Gibson, Reg. #34,605

Peter Gibson, Reg. #34,605

JANUARY 14TH 2005

January 14th 2005

Compliance with 37 CFR § 1.192(c)**A. *Acknowledgment of Notification***

Appellant respectfully acknowledges Examiner's notification in "response to the Appeal Brief filed October 4, 2004" (first sentence, Detailed Action, p.2) of a defective Brief and requiring compliance "with the provisions of 37 CFR 1.192(c)" (last sentence, p. 2) because: "At the least, the brief does not contain a concise explanation of the invention defined in the claims involved in the appeal, which references the specification by page and line number, and to the drawings, if any, by reference characters as required by 37 CFR 1.192(c)(5)" (p. 2, second sentence).

Appellant further respectfully acknowledges Examiner's quotation from MPEP 1206, reference to the proposed rule changes published in the *Federal Register* / Vol. 69, No. 155 / Thursday, August 12, 2004 / Rules and Regulations, and requirement regarding compliance with 37 CFR 1.192(c): "To avoid dismissal of appeal, Appellant must comply with the provisions of 37 CFR 1.192(c) within ... (1) ONE MONTH" (first sentence, p. 2).

Appellant respectfully notes that the requirement identified by Examiner accurately reflects the language of Rule 1.192 and, specifically, a requirement that "was not being followed in a great number of briefs before the Board" (*Federal Register* / Vol. 69, No. 155 / Thursday, August 12, 2004 / Rules and Regulations).

B. *Submission of Compliance With 37 CFR § 1.192(c)*

Appellant respectfully submits that the Amended Brief in Support of Appeal filed in triplicate with the present Compliance contains substantially the same 'Summary of Invention' of the original Brief extensively annotated with: reference numerals, references to the specification by page and line number, and explanatory notes; thereby fulfilling the requirements set forth in 37 CFR § 1.192(c)(5) identified by examiner as unfulfilled.

Compliance with 37 CFR § 1.192(c)

1 Appellant respectfully submits that the Amended Brief in Support of Appeal, with the
2 addition of annotation of the Summary of Invention with reference numerals, references to
3 the specification by page and line numbers, and notes in explanation, meets all the
4 requirements set forth in 37 CFR § 1.192(c).

5 Appellant respectfully submits that the Amended Brief in Support of Appeal, with the
6 addition of annotation of the Summary of Invention with reference numerals, references to
7 the specification by page and line numbers, and notes in explanation, meets all the
8 requirements set forth in 37 CFR § 1.192(d) in overcoming "all the reasons for non-
9 compliance stated in the notification".

10 Appellant respectfully submits that the Amended Brief in Support of Appeal differs
11 from the original Brief only in annotation of the Summary of Invention as required by
12 Examiner in compliance with 37 CFR § 1.192(c)(5) and hence relies upon the same
13 arguments and authorities relied upon to maintain appeal as required by 37 CFR § 1.192(a).

14 Appellant respectfully submits that the present Compliance including Amended Brief
15 in Support of Appeal filed in triplicate therewith is being timely filed.

16 Appellant respectfully submits, for all the reasons given above, that the present appeal
17 is in full and proper condition for consideration by the Board of Appeals which action is
18 further respectfully and humbly requested.

19
20 Respectfully yours,

21 
22

23 Peter Gibson, Reg. #34,605

24 Tel. 410/358-5912; Fax -9636

AMENDED BRIEF IN SUPPORT OF APPEAL - 37 CFR §1.192

I. Real Party in Interest

Appellant respectfully submits that the real party of interest is the same as the present inventor and applicant: Tommaso Innocenti, of Prato, Italy.

II. Related Appeals and Interferences

Appellant respectfully submits that no other appeals or interferences are known to appellant or appellant's legal representative which might directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

Appellant respectfully submits that: original claims 1 - 39 were canceled, i.e. replaced by pending claims 40 - 76 in a request for continued examination, and that the repeated rejection made final of all pending claims 40 - 76 is being appealed; or in the words of 37 CFR §1.192(c)(3): all pending claims 40 - 76 are appealed.

IV. Status of Amendments

Appellant respectfully submits that no amendment has been filed subsequent to the final rejection being appealed.

V. Summary of Invention

Appellant respectfully submits in "concise explanation of the invention defined in the claims" referring "to the specification by page and line number, and to the drawing, if any by reference characters" (37 CFR 1.192(c)(5)), that the present invention is, in the words of

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1 sole base claim 40, a “business method intended to facilitate flexible terms commodities
2 trading” comprised of seven basic steps including:

- 3 1. “providing, upon a web site 70 [p. 15, lines 3 - 10] ... a proposal format 29 [p. 16, line
4 16] in which the type of auction can be specified [p. 16, lines 25 - 26; p. 18, lines 6 -
5 26] in addition to ... specific commodity category dependent quality characteristics
6 (i.e. quality specification 35) [p. 17, line 13] desired by a prospective buyer 66”, or
7 “prospective seller 67”, “in completion of a submission [p. 11, line 12; p. 24, line 2]
8 for initiating [p. 25, line 20] an open bid 17”, or “open offer 16”(to be posted in a
9 listing 13), respectively;
- 10 2. “providing the option of provision of a model 56”, or “sample 57”, “of a particular
11 commodity desired for purposes of indicating the quality desired (as the best possible
12 quality specification 35) by a prospective buyer 67”, or “seller 66”, respectively [p.
13 18, line 18 - p. 22, line 18];
- 14 3. “posting upon said web site 70 a listing 13 [p. 15, lines 3 - 10; p. 24, lines 8 - 22] ...
15 in accordance with a completed proposal submission [p. 16, line 2 - p. 17, line 4;
16 **FIGURES 4, 5, 7, 12 & 13]** ... comprising an open offer 16 ... when initiated by a
17 prospective seller 66 and ... an open bid 17 ... when initiated by a prospective buyer
18 67 [p. 18, lines 10 - 14] ;”
- 19 4. “scheduling 50 an auction of said specified lot by posting a plurality of schedule dates
20 51 including ... commencement and conclusion dates 52, 53”[p. 22, line 19 - p. 24,
21 line 7];
- 22 5. “posting upon said web site 70 ... counter bids 27 received in response to an open
23 offer 16 and counter offers 26 received in response to an open bid 17 which vary in

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any of the terms” [p. 24, line 23 - p. p. 25, line 5; p. 25, lines 13 - 19];

6. “posting upon said web site 70 ... any offer indications 36 ... in response to posted counter bids 27 and any bid indications 37 ... in response to posted counter offers 26” [p. 25, lines 19 - 25];

7. “indicating upon said web site ... the matching in all said terms 30 (inclusive of : quantity 31, delivery terms 32, and payment terms 33) between any offer and any bid both concerned with said specified lot. [p. 25, line 26 - p. 26, line 5]”

VI. Issues

Appellant respectfully requests consideration of the below listed issues for which arguments containing the authorities relied upon in appeal follow in the order and under the issue heading indicated by the listing A - E below:

- A. Repetition of Rejection Made Final;
- B. Language Rejection Under 35 U.S.C. 112;
- C. Exclusion of Lerner from Prior Art;
- D. Failure of Rejection Under 35 U.S.C. 103;
- E. Absence of Base Claim Limitations from Prior Art.

A. Repetition of Rejection Made Final

1. Appellant respectfully submits that the final rejection conveyed in the fifth Office action dated May 4th 2004, and Applicant respectfully apologizes for the error in the heading and textual citation in response to the fourth Office action mis-identifying it as the fifth, comprises a verbatim repetition of the rejection made in the fourth Office action, and that

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1 while 'Response to Arguments' on pages 9 - 13 was added, this additional section conveyed
2 no rejection of any claim.

3
4 2. Appellant respectfully submits in evidence of verbatim repetition of rejection that the
5 paragraph below, found in the middle of page 8 in either action, contains the same
6 ungrammatical construction:

7
8 As to Claims 65-70, they are the buyer side of sample provision. See
9 the discussion of Claims 71 and 72-76 below. It would have been obvious to
10 one of ordinary skill in the art at the time the invention was made to have for
11 a buyer to provide a sample/model specifying the quality of commodities
12 because this would have allowed the seller to know exactly the qualities
13 desired.
14

15 pointed out by Applicant in response to the previous Office action:

16
17 7. Applicant respectfully submits that the rejection of claims 65 - 70 under
18 35 U.S.C. 103(a) is in error because the attribution given for the motivation to
19 combine references: "to have for (sic) a buyer to provide a sample/model
20 specifying the quality of commodities *because this would have allowed the*
21 *seller to know exactly the qualities desired.*" (5th OA., page 8, 4th par., last,
22 emphasis added); is neither attributed to, nor found in, the prior art.
23
24

25 **B. Language Rejection Under 35 U.S.C. 112**

26 1. Appellant respectfully submits that Examiner's rejection under 35 U.S.C. 112: "These
27 phrases do not make clear if a model or sample are ever provided and are read as not being
28 limitations"; consists of a capricious decision based on an irrelevant and impossible

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1 requirement: dictating the behavior of participants; supported by erroneous allegations,
2 irrelevant criticisms, and repetition of the same impossible expectation:

3
4 Additionally, the optional provision does not relate to the rest of the claim
5 language. No use of the quality indications is made in the execution of the
6 auction. An inventive feature such as bid calculation based on indicated
7 quality would perhaps relate these limitations to the rest of the Claim.

8 Claims 53, 54, 57, 59, 60 and 63 recite the qualifier 'may choose',
9 which is unclear as to whether a choice is made. (Page 2, 4th & 5th action);
10

11 because:

- 12 a. the method claimed can only provide, to any prospective seller or buyer, the option
13 of providing a sample or model when initiating an open offer or bid, it can not dictate
14 participant behavior; just as
- 15 b. it is not possible to dictate that a 'choice be made', only to provide the choice; and
- 16 c. 'quality indications' are certainly used in the method claimed, "providing the option
17 of provision of a model of a particular commodity desired" is, specifically, "for
18 purposes of indicating the quality desired by a prospective buyer" as is provision of
19 a sample for "indicating the quality (offered) by a prospective seller"; while
- 20 d. 'the rest of the claim language' includes specification of: "specific commodity
21 category dependent quality characteristics" required in the posting of a listing of a lot
22 "in accordance with a completed proposal submission detailing a plurality of terms
23 including weight, price, quality characteristics, delivery and payment"; and
- 24 e. 'an inventive feature such as bid calculation based on indicated quality' describes the
25 essential decision process of auction participants facilitated by including 'quality
26 characteristics' in the listing and claiming the same would deny an auction.

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1 2. Appellant respectfully submits that the present claims clearly point out and distinctly
2 claim the invention, that no indefinite language in the claims has been identified in
3 examination, and the only impediment with regard to satisfaction of the requirements of 35
4 U.S.C. §112 evident in this examination is the failure of the Examiner to understand either
5 said requirements or the operation of an auction generally wherein participants, while
6 confined by procedural rules, are otherwise free to choose as they please because:

7
8 If the claims, read with the specification, reasonably apprise those skilled in
9 the art of both the utilization and the scope of the invention, and if the
10 language is as precise as the subject matter permits, the courts can demand no
11 more.²³⁷ (Robert L. Harmon, *Patents and the Federal Circuit*, BNA Books,
12 Washington, D.C., Sixth Ed., 2003, pp. 260-261; citing: *Miles Labs., Inc. v.*
13 *Shandon, Inc.*, 997 F.2d 870, 27 USPQ2d 1123 (Fed. Cir. 1993); *Hybritech*
14 *Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 231 USPQ 81 (Fed. Cir.
15 1986); *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*, 758 F.2d 613,
16 225 USPQ 634 (Fed. Cir. 1985)).
17

18
19 3. Appellant respectfully submits that Examiner's 'Response to Arguments' "regarding
20 rejections under 35 U.S.C. 112":

21
22 Applicant fails clearly (to) explain a relationship between the claim language
23 and the passages cited from the prior office action. Applicant fails to address
24 the Examiner's observation that '*No use of the quality indications is made in*
25 *the execution of the auction. An inventive feature such as bid calculation*
26 *based on indicated quality would perhaps relate these limitations to the rest*
27 *of the Claim.*' Applicant fails to discuss his citation of the Examiner's
28 phrasing to explain why his phrasing is clear.

29 At pages 14 and 15, Applicant argues the first 112 cause for rejection,
30 Applicant's phrasing of 'providing an option of provision ...' in the Claims

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1 rejected under 35 U.S.C. 112, 2nd para. can also be interpreted as merely
2 providing an interface button (option) usable to order a sample or model.
3 Applicant's phrasing is vague as to what is actually provided. Reasonable
4 consideration can be given to meanings in the specification, but the wording
5 is so vague as to be ambiguous.

6 As to Applicant's arguments regarding the rejection over 'may choose'
7 phrasing, in each recitation of Claim language at pages 16-17, the wording is
8 vague. In each instance, a seller or buyer has an option of choosing certain
9 parameters, but is not required to do so by the Claim limitations. If the buyer
10 or seller exercises the option to not choose any parameters, the Claim language
11 is irrelevant and not further limiting. (Pages 9 - 10);
12

13 relies upon the same logic utilized in rejection in the previous two Office actions, rebutted
14 above, with the additional assertion that 'the wording is so vague as to be ambiguous' bereft
15 of any support save the repeated complaints that:

- 16 a. 'No use of the quality indications is made',
17 b. 'Applicant fails to discuss his citation of the Examiner's phrasing', and
18 c. 'a seller or buyer has an option ... but is not required to do so by the Claim';
19 with no reason given for why the language is vague or ambiguous except: 'Applicant's
20 phrasing is vague as to what is actually provided'; referencing 'providing an option of
21 provision', possibly indefinite because of the 'an', but the phrases actually recite "providing
22 the option of provision of a model (or sample) of a particular commodity": options fully
23 explained in the specification eliminating ambiguity; while Examiner's last supporting plaint:
24 d. 'If the buyer or seller exercises the option to not choose any parameters, the Claim
25 language is irrelevant and not further limiting';
26 is clearly erroneous as the limitations are necessarily: (i) providing the option of provision
27 of a sample to prospective sellers, and (ii) providing the option of provision of a model to

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1 prospective buyers; and it is irrelevant 'if the buyer or seller exercises the option' because
2 the options still exist and provision of the options are necessary to the claimed invention.

3
4 4. Appellant respectfully submits that:

- 5 a. 'providing an option of provision' of a sample or a model by a prospective seller or
6 buyer, "for purposes of indicating the quality desired" comprises the best means of
7 indicating quality augmenting the 'use of the quality indications';
8 b. failure to discuss 'citation of the Examiner's phrasing' is wholly irrelevant because
9 Examiner's phrasing is not at issue here;
10 c. the language of the claims can not require a buyer or seller to exercise an option, said
11 language can only define the option provided;
12 d. the claim language is limiting in necessarily providing the options; and
13 hence the repeated complaints supporting Examiner's allegation of language 'so vague as to
14 be ambiguous' are respectively: erroneous, irrelevant, impossible, and erroneous.

15
16 5. Appellant respectfully submits that the present base claim does contain two hitherto
17 unnoticed and wholly accidental informalities of language: the word 'desired' in line 13 is
18 extraneous and in line 14 would be better replaced by a word such as 'offered' which
19 correction:

- 20 c. Providing the option of a provision of a sample of a particular commodity
21 [desired] for purposes of indicating the quality [desired] offered by a prospective
22 seller; in lines 13 and 14
23 would better define the step of providing the option of provision of a sample by a prospective

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1 seller in contrast to the language used in the step of providing the option of provision of a
2 model by a prospective buyer, lines 7 - 8, and is invited by Examiner's amendment in
3 correction of the only language informalities known in the present claims.
4

5 **C. Exclusion of Lerner from Prior Art**

6 1. Appellant respectfully submits that Examiner was in error in rejecting the declaration
7 dated January 20, 2004 attesting to the receipt of Exhibit A by the present patent practitioner
8 on 15 June 2000 and to consider this evidence 'insufficient' to disqualify Lerner from valid
9 prior art as being predated by the invention and exercise of due diligence because:

- 10 a. Exhibit A is dated: the transmitting facsimile machine clearly dated it in the top
11 margin 15/06/00, 15 June 2000;
12 b. Exhibit A doesn't require a signature;
13 c. due diligence is provided in the exhibit in the form of a request for assistance in
14 obtaining U.S. Patent Protection for his invention:

15
16 I have devised a special, new way to put up natural raw
17 materials auctions for internet auctions and I would like to
18 implement it but, before any further step, I would like to patent
19 it in order to prevent competitions' imitation ... (is it) sufficient
20 to list ... all the software program instructions or, even easier ...
21 the algorithmic and logic operations of what the web site server
22 uses and then drawing it through a flow chart ... if your office
23 can help me into the all process even if I live in Italy ... Your
24 sincerely, Dr. Tommaso Innocenti (Exhibit A);
25

26 as this initial contact resulted in the present application being filed;

- 27 d. the inventor was clearly, as demonstrated by Exhibit A, in possession of the invention

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1 at the time of the machine dated transmission received on 15 June 2000 as declared
2 by the present practitioner;

3 e. 15 June 2000 is prior to the effective, claimed provisional, filing date of Lerner.
4

5 **D. Failure of Rejection Under 35 U.S.C. 103**

6 1. Appellant respectfully submits that Examiner was in error to rely upon benefits
7 provided by the presently claimed invention in rejection:

8
9 As to Claims 65-70, they are the buyer side of sample provision. See
10 the discussion of Claims 71 and 72-76 below. It would have been obvious to
11 one of ordinary skill in the art at the time the invention was made to have for
12 a buyer to provide a sample/model specifying the quality of commodities
13 because this would have allowed the seller to know exactly the qualities
14 desired. (Page 8);
15

16 as allowing 'the seller to know exactly the qualities desired' is precisely the intention of
17 providing the option of providing a model: "for purposes of indicating the quality desired by
18 a prospective buyer" (lines 7 - 8); given in present base claim 40 and while knowledge
19 generally available to one practiced in the art may be relied upon in rejection under 35
20 U.S.C. 103 hindsight of the applicant's disclosure can not be so relied upon:

21
22 §103 demands that obviousness be tested as of 'the time the invention was
23 made.'³¹ The analytic focus is upon the state of knowledge at the time the
24 invention was made.³² ... The judge now knows all about the invention; he or
25 she must determine whether it would have been obvious to those who knew
26 only about the prior art.³⁴ He or she must view the prior art without reading
27 into it the (application's) teachings.³⁵ (Robert L. Harmon, *Patents and the*
28 *Federal Circuit*, BNA Books, Washington, D.C., Sixth Ed., 2003, p. 157;

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1 citing: ³¹35 U.S.C. §103; ³²*In re Raynes*, 7 F.3d 1037, 28 USPQ2d 1630 (Fed.
2 Cir. 1990); ³⁴*Panduit Corporation v. Dennison Mfg. Co.*, 774 F.2d 1082, 227
3 USPQ 337 (Fed. Cir. 1985));
4

5 And although the person skilled in the art is presumed to know the art--indeed,
6 he or she is pictured as working in a shop with the art hanging on the walls
7 round about--the art in question is only that which he or she would have
8 selected without the advantage of hindsight or knowledge of the invention.³⁷
9 (*Ibid.*, p. 158; citing ³⁷*Union Carbide Corp. v. American Can Co.*, 724 F.2d
10 1567, 220 USPQ 584 (Fed. Cir. 1984);
11

12 Hindsight is a tempting but forbidden zone.⁴³ (*Ibid.*, p. 158; citing ⁴³*Loctite*
13 *Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 228 USPQ 90 (Fed. Cir. 1985)); and
14
15

16 in lacking any attribution to the prior art and relying solely upon motivation to modify prior
17 art reflecting a benefit of the presently considered invention hindsight of the invention
18 remains as the only possible source for both the elements added in modification as well as
19 the only source for the motivation for the modification.
20

21 2. Appellant respectfully submits that use of hindsight of the invention being considered
22 in examination is prohibited and safe guarded against by the requirement that: "Both the
23 suggestion and the expectation of success must be founded in the prior art, not in the
24 applicant's disclosure."³⁹ (*Ibid.*, p. 200; citing ³⁷*Panduit Corp. v. Dennison Mfg. Co.*, 810
25 F.2d 1561, 1 USPQ2d 1593 (Fed. Cir. 1987)); and any rejection under 35 U.S.C. 103 lacking
26 either the suggestion or expectation of success in the prior art, and both are lacking in the
27 present case, is improper and defective.
28

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1 3. Appellant respectfully submits that the discussion immediately above is fully
2 applicable to the only rejection under 35 U.S.C. 103 of the sole base claim 40 because said
3 base claim requires providing the option of provision of a model by a prospective buyer and
4 there is no prior art identified by examiner as disclosing or suggesting the provision of a
5 model, only the 'converse' provision of a sample, by flying 'a team' to 'potential vendor
6 sites' or 'production facilities' to personally visit and 'obtain samples':

7
8 In many corporations, the election of a new supplier for production
9 purchases usually involves the creation of a team from purchasing,
10 engineering, and manufacturing to evaluate all potential sellers. *The team*
11 *usually flies to potential vendor sites to evaluate capabilities and production*
12 *facilities, obtain samples, and then return home to evaluate the samples.*
13 (Conkling, column 8, lines 17 - 24, emphasis added);
14

15 which common practice could not possibly disclose or suggest "providing the option of
16 provision of a sample of a particular commodity" "upon a web site" as required by present
17 base claim 40 much less possibly disclose or suggest "providing the option of provision of
18 a model of a particular commodity" "upon a web site" as additionally required by present
19 base claim 40 and hence there is absolutely no possibility of 'founding' either the suggestion
20 or the expectation of success in the prior art as required of any rejection under 35 U.S.C.
21 103.

22
23 4. Appellant respectfully submits that the rejection of claims 40 - 64 under 35 U.S.C.
24 103, repeated and made final in the last Office action, was thoroughly rebutted, regardless
25 of prior art inclusion or exclusion of Lerner, in response to the previous Office action and
26 this rebuttal was only addressed in the last Office action in the one following paragraph:

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1
2 As to the 35 U.S.C. rejections, at section B, para. 2, (Applicant) appears
3 to argue that *Lerner*, by not disclosing auction format specification, is
4 precluded from disclosing an auction. The Examiner cited *Lerner* at paras.
5 117 and 121 as disclosing an auction which inherently has steps a. and b. at
6 lines 14-17 of page 9 of the response. (p. 10, 3rd par.);
7

8 regarding section B, Errors in Examination, while the only response to section C, Submission
9 of Evidence Overcoming Grounds of Rejection, at the bottom of page 12 is concerned with
10 Applicant's attempt "to disqualify the *Lerner* reference" and "As to other paras. In Section
11 (C), they are restatements of points addressed above".
12

13 5. Appellant respectfully submits, in demonstration of the failure of the last Office action
14 to address the rebuttal of the rejection of claims 40 - 64 except for the one paragraph recited
15 above, that the 'Response to Arguments' therein, after beginning with the blanket statement
16 that "Applicant's arguments filed February 6, 2004 have been fully considered but they are
17 not persuasive" (page 9) and ending in "Arguments presented by Applicant at other locations
18 of the response are repetitive and addressed above" (page 13) consists of:

- 19 a. referral to MPEP for change of correspondence address;
20 b. acknowledgment of section A, Acknowledgment of Action, with a sentence: "At
21 pages 1-8 of the Response, Applicant exhaustively discusses elements of the prior
22 office action.";
23 c. response to arguments concerning rejection under 35 U.S.C. 112 on pages 9 - 10;
24 d. the paragraph recited above;
25 e. erroneous accusation of irrelevant failure in argument:

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1
2 At para. 3, Applicant fails to explain why the features disclosed
3 by *Moshal* and providing motivation in combine (sic) are not
4 beneficial. *Applicant* quotes *Moshal* as disclosing configurability,
5 flexibility and high capacity. Applicant fails to explain why these are
6 not beneficial and why they would not provide a reason for the
7 combination of references.
8

9 as Applicant actually pointed out that the “motivation attributed to the prior art ... is
10 lacking” because Moshal “fails to specify any particular benefits, only ‘multiple
11 existing new types of auction’ that ‘may be created and conducted’” which can only
12 be regarded as speculation in terms so general as to be suggestive of anything and
13 hence nothing in particular;

14 f. repetition of an irrelevant, illogical, and wholly extraneous argument: “At para. 4,
15 Applicant appears to suggest that different buyer and seller web sites provide some
16 feature or advantage ... In this case, different sites increase the number of access
17 points to the system and enhance accessibility” (pages 10 - 11); despite the fact that
18 the presently claimed invention specifies “a web site accessible upon the world wide
19 web” (claim 40, line 3), use of multiple sites for hosting is not even mentioned in the
20 entire application, and the idea was rebutted with the argument that this “makes no
21 sense: use of different web sites does not improve Internet accessibility”;

22 g. omission of paragraph B.5 in response unless the repetition of the blanket statement:
23 “Applicant’s arguments are fully addressed considering all grounds of rejection” is
24 an argument in response;

25 h. an erroneous statement combined with an irrelevant accusation:

26 i. “At para. 6, Applicant admits that provision of a sample is ‘common

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- 1 commerce practice””; and
- 2 ii. Applicant “fails to address why the Examiner’s argument that such samples
- 3 would help buyers evaluate potential sellers is incorrect”;
- 4 as Applicant submitted that the rejection was “in error because Examiner admits that
- 5 *Lerner and Moshal et al. ‘do not disclose direct provision of a sample by a seller to*
- 6 *a prospective buyer’”* (B. 6, p. 11) as the prior art cited as disclosing this, Conklin,
- 7 just references a common commerce practice wherein “the team usually flies to
- 8 potential vendor sites to evaluate capabilities and production facilities, obtain
- 9 samples, and then return home to evaluate the samples”; which practice fails to
- 10 disclose or suggest: direct provision of a sample, ‘a particular commodity’, direct
- 11 provision of a sample to indicate the quality of a particular commodity, models of
- 12 commodity quality desired, or use of any of these elements in an online auction.
- 13 i. in response to B.7 repetition of the statement, first made re. par. 4, that:
- 14
- 15 obviousness can only be established by combining or modifying the
- 16 teachings of the prior art to produce the claimed invention where there
- 17 is some teaching, suggestion, or motivation to do so found either in the
- 18 references themselves *or in the knowledge generally available to one*
- 19 *of ordinary skill in the art*
- 20
- 21 citing *In re Fine* and *In re Jones* without any actual argument pertaining to any issue
- 22 at all;
- 23 j. in response to B.8, verbatim repetition of the above citing *In re Fine* and *In re Jones*
- 24 without any actual argument pertaining to any issue at all;
- 25 k. in response to B.9, verbatim repetition of the above citing *In re Fine* and *In re Jones*

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1 without any actual argument pertaining to any issue at all;

2 1. in response to B.10, verbatim repetition of the above citing *In re Fine* and *In re Jones*

3 without any actual argument pertaining to any issue at all;

4 m. no response whatsoever to paragraph C.5, recited in full below as one of the most
5 important arguments presented by Applicant in rebuttal of the rejection of present
6 base claim 40:

7 5. Applicant respectfully submits that regardless of the fact
8 established by the declaration of prior invention under 37 CFR §1.131
9 that *Lerner* is not prior art a number of limitations to the present base
10 claim, 40, from which all other present claims are properly dependent,
11 are undisclosed by the combination of *Lerner* and *Moshal et al.* relied
12 solely upon in rejection of said base claim including:

13 a. providing, upon a web site ... a proposal format *in which the*
14 *type of auction can be specified* in addition to the particular
15 commodity, weight, price, and specific commodity category
16 dependent quality characteristics desired by a prospective buyer
17 *in completion of a submission for initiating an open bid;*

18 b. *providing the option of provision of a model* of a particular
19 commodity desired for purposes of indicating the quality desired
20 by a prospective buyer;

21 c. providing, upon a web site accessible upon the world wide web,
22 a proposal format *in which the type of auction can be specified*
23 in addition to the particular commodity, weight, price, and
24 specific commodity dependent quality characteristics offered by
25 a prospective seller *in completion of a submission for initiating*
26 *an open offer;*

27 d. *providing the option of provision of a sample* of a particular
28 commodity desired for purposes of indicating the quality desired
29 by a prospective seller;

30 by Examiner's own admission: "Lerner does not specifically disclose
31 auction format specification" (5th OA, page 5, 3rd par., first sentence)
32 hence denying the steps of specifying the type of auction in a proposal

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1 format in completion of a submission initiating either an open bid or
2 offer as the motivation for combining the teachings of *Moshal et al.*
3 consists of prior art speculation of “multiple existing and new types of
4 auction’ that ‘may be created and conducted” (above, paragraph B.3);
5 and “*Lerner and Moshal et al. ‘do not disclose provision of a sample*
6 *by a seller to a prospective buyer*” (above, paragraph B. 6) and
7 therefore cannot disclose the step of providing the option of provision
8 of a sample or model. (Pages 18 - 19);
9

- 10 n. no response whatsoever to paragraph C.6 or C.7 recited in full below as one of the
11 most important arguments presented by Applicant in rebuttal of the rejection of claim
12 40:

13
14 Applicant respectfully submits that the language of the four
15 steps in present base claim 40 identified above, and of other steps
16 thereto, patentably distinguish the presently claimed invention over the
17 prior art by offering an online auction format for commodities that
18 allows prospective sellers and buyers to specify the type of auction “in
19 addition to the particular commodity, weight, price, and specific
20 commodity category dependent quality characteristics desired” in a
21 submission initiating either an open offer or bid, according to the
22 originator, and provides for the option of providing either a sample or
23 model representative of the quality offered or sought, respectively, by
24 a prospective seller or buyer. (Page 19)
25

- 26 o. the argument concerning inclusion of *Lerner* in the prior art discussed above in
27 section C.1;
28 wherein it is seen that the main arguments presented by Applicant in rebuttal of repeated
29 rejection of the present base claim concerning limitations in said base claim absent from and
30 unsuggested by the prior art are wholly evaded except for the one paragraph recited in D.1

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1 above.

2
3 6. Appellant respectfully submits that the sole paragraph addressing Applicant's
4 argument that the rejection of present base claim 40 is overcome by the demonstration that
5 limitations thereto are absent and unsuggested by the prior art:

6
7 As to the 35 U.S.C. rejections, at section B, para. 2, (Applicant) appears to
8 argue that *Lerner*, by not disclosing auction format specification, is precluded
9 from disclosing an auction. The Examiner cited *Lerner* at paras. 117 and 121
10 as disclosing an auction which inherently has steps a. and b. at lines 14-17 of
11 page 9 of the response. (p. 10, 3rd par.);
12

13 comprises an irrelevant, unfounded, and erroneous interpretation of Applicant's arguments
14 which never even intimated the absurd allegation that *Lerner* could not disclose an auction.
15

16 7. Appellant respectfully submits that the language of claim 40 restricts the presently
17 claimed invention to:

18 a. "providing, upon a web site ... a proposal format in which the type of auction can be
19 specified ... by a prospective buyer in completion of a submission for initiating an
20 open bid" (lines 3 - 6);

21 b. "providing, upon a web site ... a proposal format in which the type of auction can be
22 specified ... by a prospective seller in completion of a submission for initiating an
23 open offer" (lines 9 - 12); which

24 limitations are both absent from and unsuggested by the only references cited by Examiner
25 as supplying these steps as evidenced by Examiner's admission that "*Lerner does not*

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1 *specifically disclose the limitation of auction format specification.*” (p. 5, 1st sentence) and
2 the fact that Mosal ‘fails to specify any particular benefits’, just speculation upon ‘multiple
3 existing new types of auction’ that ‘may be created or conducted’.

4
5 8. Appellant respectfully submits that since Examiner’s only address of Applicant’s
6 contention that the step of providing ‘a proposal format in which the type of auction can be
7 specified’ relies upon implicit disclosure by the very reference admitted not to disclose this
8 limitation, rejection of present base claim 40 under 35 U.S.C. 103 is overcome, because an
9 unexplained allegation of inherence, particularly in a reference previously admitted not to
10 disclose the limitation, is of no weight because: “To establish inherency, the extrinsic
11 evidence ‘must make clear that the missing descriptive matter is necessarily present in the
12 thing described in the reference, and that it would be so recognized by persons of ordinary
13 skill.’” (MPEP 2112, citing: *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51)
14 (Fed. Cir. 1999), p. 2100-52).

15
16 9. Appellant respectfully submits that:

- 17 a. ‘at least some degree of predictability is required’ (MPEP 2143.02) of the prior art
18 in support of an obviousness rejection;
19 b. Applicant may introduce evidence “showing there was no reasonable expectation of
20 success” to “support a conclusion of nonobviousness” (*Ibid.*, citing *In re Rhinehart*,
21 531 F.2d 1048, 189 USPQ 143 (CCPA 1976));
22 c. absent the disclosure or suggestion by the prior art of all claimed limitations there can
23 be no reasonable expectation of success.

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E. Absence of Base Claim Limitations from Prior Art

1. Appellant respectfully submits that the present base claim limitations of:

- a. “providing, upon a web site ... a proposal format in which the type of auction can be specified” (lines 3 - 4 & 9 - 10);
- b. “providing the option of provision of a model of a particular commodity desired for purposes of indicating the quality desired by a prospective buyer” (lines 7 - 8);
- c. “providing the option of provision of a sample of a particular commodity” “for purposes of indicating the quality (offered) by a prospective seller” (lines 13 - 14);
- d. “providing, upon a web site ... a proposal format in which ... commodity category dependent quality characteristics” “can be specified” (lines 3 - 5);
- e. “posting upon said web site, in association with said listing, any offer indications ... in response to posted counter bids and any bid indications ... in response to posted counter offers” (page 2, lines 4 - 6);

are each absent from and unsuggested by the prior art cited in rejection and recognition of the absence of any of these claimed limitations overcomes rejection of all the present claims under 35 U.S.C. 103 as any rejection thereunder must include all the claimed limitations:

To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA). ‘All words in a claim must be considered in judging the patentability of that claim against the prior art.’ *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). (MPEP 2143.03).

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1 2. Appellant respectfully submits that the provision of ‘a model of a particular
2 commodity desired for purposes of indicating the quality desired by a prospective buyer’, in
3 an online auction particularly, is most certainly neither disclosed nor suggested by the prior
4 art as a sample taken away from a ‘potential vendor’ visited by a team neither discloses nor
5 suggests:

- 6 a. a sample of ‘a particular commodity’;
7 b. use of the Internet;
8 c. an auction; or
9 d. a model of something desired;

10 much less ‘a model of a particular commodity desired ... by a prospective buyer’ in an online
11 auction and that this particular limitation, introduced to the present base claim by amendment
12 in requesting continued examination, originally was in a dependent claim that was not even
13 rejected initially and the only argument presented for disclosure or suggestion by the prior
14 art relies on the equivalence of a sample and a model, which equivalence denies the
15 distinction between prospective buyer and seller fundamental to any auction.
16

17 3. Appellant respectfully submits that “In the ordinary patent case, the trier of fact must
18 answer the *Graham* inquiries relating to (1) the scope and content of the prior art, (2) the
19 differences between the art and the claims at issue, (3) the level of ordinary skill in the art,
20 and (4) whatever objective evidence may be present.²⁰ (Robert L. Harmon, *Patents and the*
21 *Federal Circuit*, BNA Books, Washington, D.C., Sixth Ed., 2003, p. 156; citing: ²⁰ *Speciality*
22 *Composites v. Cabot Corp.*, 845 F.2d 981, 6 USPQ2d 1601 (Fed Cir. 1988); *Allen Archery,*
23 *Inc. v. Browning Mfg. Co.*, 819 F.2d 1087, 2 USPQ2d 1490 (Fed. Cir. 1987); *Connell v.*

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1 *Sears, Roebuck & Co.*, 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983).
2

3 4. Appellant respectfully submits that both the scope and content of the prior art have
4 been and continue to be disputed in the present examination, particularly regarding inclusion
5 or exclusion of the *Lerner* reference, but that regardless of the scope factual determination
6 of the content of the prior art necessarily excludes the provision of the option of providing
7 a model of a particular commodity desired by a prospective buyer in an online auction as this
8 limitation to present base claim 40 is unknown to the prior art as demonstrated by reliance
9 upon alleged equivalence of a model with a sample, despite the necessary elimination of the
10 fundamental difference between a prospective buyer and a seller necessary to any auction,
11 leaving the claimed limitation without even an attribution to the prior art.
12

13 5. Appellant respectfully submits that, regardless of other claimed limitations identified
14 above (E.1) as being 'each absent from and unsuggested by the prior art cited in rejection',
15 the absence of the option of providing a model of a particular commodity desired by a
16 prospective buyer in an online auction from the content of the prior art constitutes a
17 'difference between the art and the claims at issue' that 'the level of ordinary skill in the art'
18 can not supply and hence, in accordance with *Graham v. Deere*, the presently claimed
19 invention and all pending claims are unobvious in view of the prior art and patentably
20 distinguished over the prior art by this novel limitation.
21

22 6. Appellant respectfully submits that the content of the prior art, taken as a whole, has
23 further been demonstrated to lack disclosure or suggestion of an online auction adapted for

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1 commodities wherein: “specific commodity category dependent quality characteristics
2 desired by a prospective buyer in completion of a submission for initiating an open bid” “can
3 be specified” (lines 4 - 6); and that this limitation constitutes a ‘difference between the art
4 and the claims at issue’ that ‘the level of ordinary skill in the art’ can not supply and hence,
5 in accordance with *Graham v. Deere*, the presently claimed invention and all pending claims
6 are unobvious in view of the prior art and patentably distinguished over the prior art by this
7 novel limitation.
8

9 7. Appellant respectfully submits that the present brief has been timely filed in triplicate,
10 all grounds of rejection made final have been overcome by factual evidence, a number of
11 claimed limitations patentably distinguishing the presently claimed invention over the prior
12 art including: specification of auction format, posting of offer indications in response to
13 posted counter bids and bid indications in response to posted counter offers, specification
14 of specific commodity category dependent quality characteristics either offered by a
15 prospective seller, or most particularly desired by a prospective buyer, and the option of
16 providing either a sample or, most particularly, a model “of a particular commodity desired
17 for purposes of indicating the quality desired”; each have been pointed out, using the
18 language of the claims, as limitations patentably distinguishing the presently claimed
19 invention over the prior art.
20

21 8. Appellant respectfully submits, for all the reasons given above, that the present
22 application is in full and proper condition for allowance which action is further respectfully
23 requested preferably with the examiner’s amendment invited above in correction of the only

Application No.: 09/866,652
Filed: May 30th 2001


Art Unit: 3624

Examiner: Charles R Kyle
Applicant: Tommaso Innocenti

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1 known language informalities in the claims.

2
3 Respectfully yours,

4 
5 *Peter Gibson, Reg. #34,605*

6 Peter Gibson, Reg. #34,605

7 Ph.410/358-5912; Fax-9636

**APPENDIX to Brief in Support of Appeal: All Claims 40 - 76**

40. A business method intended to facilitate flexible terms commodities trading comprising the steps of:

providing, upon a web site accessible upon the world wide web, a proposal format in which the type of auction can be specified in addition to the particular commodity, weight, price, and specific commodity category dependent quality characteristics desired by a prospective buyer in completion of a submission for initiating an open bid;

providing the option of provision of a model of a particular commodity desired for purposes of indicating the quality desired by a prospective buyer;

providing, upon a web site accessible upon the world wide web, a proposal format in which the type of auction can be specified in addition to the particular commodity, weight, price, and specific commodity dependent quality characteristics offered by a prospective seller in completion of a submission for initiating an open offer;

providing the option of provision of a sample of a particular commodity desired for purposes of indicating the quality desired by a prospective seller;

posting upon said web site a listing for a specified lot of a particular commodity in accordance with a completed proposal submission detailing a plurality of terms including weight, price, quality characteristics, delivery and payment comprising an open offer of said specified lot when initiated by a prospective seller and comprising an open bid of said specified lot when initiated by a prospective buyer;

scheduling an auction of said specified lot by posting a plurality of schedule dates including but not restricted to commencement and conclusion dates between which responses to said listing will be received;

posting upon said web site, in association with said listing, counter bids received in response to an open offer and counter offers received in response to an open bid which vary

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in any of the terms included in said plurality of terms detailed in said listing;

posting upon said web site, in association with said listing, any offer indications by said prospective seller in response to posted counter bids and any bid indications by said prospective buyer in response to posted counter offers signifying a modification of at least one term in said listing;

indicating upon said web site, in association with said listing, the matching in all said terms between any offer and any bid both concerned with said specified lot.

41. The business method of **claim 40** further including the step of deposing, upon said web site, said listing following indication of the matching in all said terms between any offer and any bid both concerned with said specified lot.

42. The business method of **claim 40** wherein said web site providing said proposal format in which the type of auction can be specified by a prospective buyer in completion of a submission for initiating an open bid is different than said web site providing said proposal format in which the type of auction can be specified by a prospective seller in completion of a submission for initiating an open offer.

43. The business method of **claim 40** wherein said web site providing said proposal format in which the type of auction can be specified by a prospective buyer in completion of a submission for initiating an open bid is the same as said web site providing said proposal format in which the type of auction can be specified by a prospective seller in completion of a submission for initiating an open offer.

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44. The business method of **claim 40** further including the step of providing notification to subscribers of listings identified by commodity category as being of interest to said subscribers.

45. The business method of **claim 44** wherein said notification is provided by electronic means inclusive of e-mail.

46. The business method of **claim 40** wherein said web site providing said proposal format in which the type of auction can be specified by a prospective buyer in completion of a submission for initiating an open bid provides registration access means for registration of said prospective buyer with an auction house maintaining said web site.

47. The business method of **claim 46** wherein registration of said prospective buyer requires payment of a fee to said auction house by said prospective buyer.

48. The business method of **claim 40** wherein said web site providing said proposal format in which the type of auction can be specified by a prospective seller in completion of a submission for initiating an open offer provides registration access means for registration of said prospective seller with an auction house maintaining said web site.

49. The business method of **claim 48** wherein registration of said prospective seller requires payment of a fee to said auction house by said prospective seller.

continued

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50. The business method of **claim 40** wherein said web site providing said proposal format in which the type of auction can be specified by a prospective buyer in completion of a submission for initiating an open bid provides directory access means for accessing a directory comprised of a plurality of commodity categories.

51. The business method of **claim 50** wherein an auction house maintaining said web site provides listings pertaining to a particular commodity category chosen from said plurality of commodity categories to said prospective buyer by subscription.

52. The business method of **claim 50** wherein said subscription requires payment of a fee by said prospective buyer to an auction house providing said listings.

53. The business method of **claim 40** wherein said prospective seller, in specification of the type of auction, may choose upward, open, unconstrained bidding wherein said listing specifies an initial minimum price and bidding within the time between said commencement and conclusion dates is otherwise unconstrained with regard to price.

54. The business method of **claim 40** wherein said prospective seller, in specification of the type of auction, may choose upward, incremental, unconstrained bidding wherein said listing specifies an initial minimum price and bidding within the time between said commencement and conclusion dates is otherwise only constrained with regard to price by the progressive increase of the same in predetermined increments.

continued

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55. The business method of **claim 54** wherein said predetermined increments constraining said progressive increase of price are a function of time.

56. The business method of **claim 54** wherein said predetermined increments constraining said progressive increase of price are a function of the number of responses received.

57. The business method of **claim 40** wherein said prospective seller, in specification of the type of auction, may choose downward, incremental, constrained bidding wherein said listing specifies an initial maximum price and bidding within the time between said commencement and conclusion dates is constrained with regard to price by the progressive decrease of the same in predetermined increments and by a predetermined minimum price which is not posted in said listing.

58. The business method of **claim 57** wherein said predetermined increments constraining said progressive decrease of price are a function of time.

59. The business method of **claim 40** wherein said prospective buyer, in specification of the type of auction, may choose downward, open, unconstrained offering wherein said listing specifies an initial maximum price and offering within the time between said commencement and conclusion dates is otherwise unconstrained with regard to price.

60. The business method of **claim 40** wherein said prospective buyer, in specification of the type of auction, may choose downward, incremental, unconstrained offering wherein said listing specifies an initial maximum price and offering within the time between said

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commencement and conclusion dates is otherwise only constrained with regard to price by the progressive decrease of the same in predetermined increments.

61. The business method of **claim 60** wherein said predetermined increments constraining said progressive decrease of price are a function of time.

62. The business method of **claim 60** wherein said predetermined increments constraining said progressive decrease of price are a function of the number of responses received.

63. The business method of **claim 40** wherein said prospective buyer, in specification of the type of auction, may choose upward, incremental, constrained bidding wherein said listing specifies an initial minimum price and offering within the time between said commencement and conclusion dates is constrained with regard to price by the progressive increase of the same in predetermined increments and by a predetermined maximum price which is not posted in said listing.

64. The business method of **claim 63** wherein said predetermined increments constraining said progressive increase of price are a function of time.

65. The business method of **claim 40** wherein said model of a particular commodity is provided by said prospective buyer directly to prospective sellers.

66. The business method of **claim 40** wherein said model of a particular commodity is provided by said prospective buyer to an auction house maintaining said web site.

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67. The business method of **claim 66** wherein said model of a particular commodity provided by said prospective buyer to said auction house is tested by a laboratory and testing results are posted on said web site in association with said listing.

68. The business method of **claim 66** wherein said model of a particular commodity provided by said prospective buyer to said auction house is provided to prospective sellers by said auction house.

69. The business method of **claim 68** wherein said model of a particular commodity provided by said prospective buyer to said auction house is divided proportionally by said auction house in accordance with a number of prospective sellers each of whom is provided a proportion of said model by said auction house.

70. The business method of **claim 68** wherein said model of a particular commodity provided by said prospective buyer to said auction house is comprised of a discrete number of pieces each esteemed by said auction house to possess substantially equivalent quality and prospective sellers are each provided with one said piece of said model by said auction house.

71. The business method of **claim 40** wherein said sample of a particular commodity is provided by said prospective seller directly to prospective buyers.

72. The business method of **claim 40** wherein said sample of a particular commodity is provided by said prospective seller to an auction house maintaining said web site.

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73. The business method of **claim 72** wherein said sample of a particular commodity provided by said prospective seller to said auction house is tested by a laboratory and testing results are posted on said web site in association with said listing.

74. The business method of **claim 72** wherein said sample of a particular commodity provided by said prospective seller to said auction house is provided to prospective buyers by said auction house.

75. The business method of **claim 74** wherein said sample of a particular commodity provided by said prospective seller to said auction house is divided proportionally by said auction house in accordance with a number of prospective buyers each of whom is provided a proportion of said sample by said auction house.

76. The business method of **claim 74** wherein said sample of a particular commodity provided by said prospective seller to said auction house is comprised of a discrete number of pieces each esteemed by said auction house to possess substantially equivalent quality and prospective buyers are each provided with one said piece of said sample by said auction house.